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**REEXAMINING THE LEGISLATIVE
RESTRICTIONS ON THE DOMESTIC USE OF
THE UNITED STATES MILITARY TO
COMBAT DOMESTIC TERRORISM:
A COMPARATIVE ANALYSIS**

by

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September, 1996

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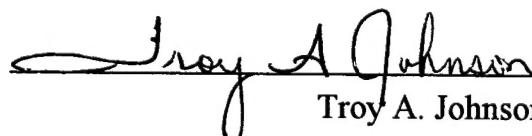
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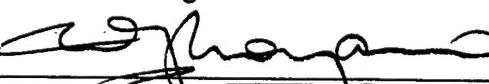
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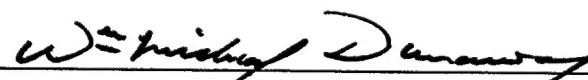
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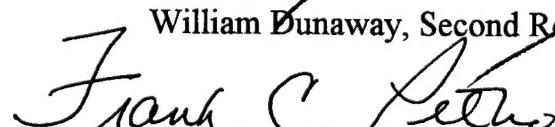
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I. INTRODUCTION

Recent terrorist actions within the continental United States have heightened the awareness of the American public to the threat terrorism poses to the nation's continued domestic tranquility. The bombings of the World Trade Center in 1993 and the Alfred P. Murrah Federal Building in Oklahoma City in 1995, coupled with the growing anti-government movement symbolized by the Waco, Ruby Ridge and Freemen sieges have forced Congress and the Executive to respond to the public's demand for increased domestic security. That response has taken the form of the Antiterrorism and Effective Death Penalty Act of 1996.

While the legislation stopped just short of repealing the Posse Comitatus Act of 1878, which currently prevents the military from participating in the search, seizure and arrest of citizens within the sovereign territory of the United States, the debate was robust enough to encourage those who sought the repeal of the Posse Comitatus Act to remain confident that future legislation may accomplish the task.

Domestic terrorism has been a constant in United States history. While an appropriate and lengthy discussion may be warranted on the various definitions of domestic terrorism, I will forego the discussion. In this thesis, terrorism is

defined as "the systematic use of murder and destruction, and the threat of murder and destruction in order to terrorize individuals, groups, communities or governments into conceding to the terrorist's political demands."¹ Defined like this, terrorism can be domestic or international.

By domestic I mean acts of terrorism perpetrated by individuals or organizations of any nationality within the continental United States. I define international terrorism as acts committed by individuals or groups against Americans or American interests abroad. In the case of international terrorism, the President is not restricted in his use of the military. This thesis focuses on domestic terrorism in order to examine the past and current legislation that imposes severe restrictions on the Executive in its ability to use the military to combat domestic violence.

Legislation was created and continually amended in order to strike a balance between the need of the federal government to preserve and protect the Union from a combination of forces "too powerful to be suppressed by the ordinary course of judicial proceedings," and the need to preserve the civil liberties of its citizens. An enduring legacy of the legislation has been the Posse Comitatus Act. However, it is only recently that the terrorist threat has become

¹Paul Wilkinson, Terrorism and the Liberal State, (London: Macmillan, 1977), 51.

sufficiently serious to warrant a reexamination of Posse Comitatus.

The transition of a state from a free and open society to one that limits or temporarily suspends the civil rights of its citizens for the good of the whole can be a slow and challenging process. Some may insist that the United States' tradition of democracy may prevent it from ever imposing severe restrictions upon its citizens or allowing the passage of legislation which may be perceived as posing a threat to the civil liberties of its citizens.

This study employs a historical and comparative study method. Through a historical legislative review, I intend to show in Chapter II that, while some may see the domestic employment of the military as contrary to the original intent of the founding fathers, and contrary perhaps to our nation's traditions, American history is replete with examples of domestic use of the military in law enforcement under the strict guidelines of the Constitution.

I will show that the original intent of the various legislative acts restricting the domestic use of the military by the President was intended to protect citizens' civil liberties against a government that could become repressive and which had a standing army at its call. With the memory of the British Red Coats enforcing the will of the British

government still fresh on their minds, the founding fathers and subsequent Congresses sought to protect the citizens of the United States from similar abuse.

Still, they had to confront the dilemma of how to provide the President a collective means to protect the Union, while at the same time, maintaining the individual sovereignty of the states. The progression in which the legislation developed clearly attempted to give the President the necessary authority to call forth the militia and the regular army while limiting the circumstances in which he could utilize them.

I will show that current restrictive legislation, namely the Posse Comitatus Act, came about as a result of the Executive's looseness in its delegation of authority to use military troops domestically, particularly during Reconstruction, and this led Congress to rein in much of the authority of the President to use the military domestically. I conclude the chapter with an analysis which states my belief that the current restrictive legislation is a result of the early Congress' concerns of how, not whether, the military should be used domestically.

In Chapter III, I introduce a legislative and military comparison with Great Britain. I explore the use and effectiveness of emergency legislation which included proscription, exclusion orders and internment as a means to

combat domestic terrorism. Furthermore, I examine the reasons behind the British decision to escalate the use of force to combat the IRA. I show how in response to the increased violence brought about by the IRA in Northern Ireland and the inability of the police to handle the escalation of violence, the British government progressed from the use of their police, to the use of their regular Army to finally the use of their elite military, the Special Air Service Regiment, in an effort to not only quell the violence but also eradicate the IRA. I conclude the chapter with my analysis of whether the combination of a broader use of the military and vigorous anti-terrorism legislation has had an effect on the ability to nullify the IRA as a terrorist threat.

I conclude this thesis with a discussion on President Clinton's proposed Omnibus Counterterrorism Bill, and its attempt to repeal the Posse Comitatus Act. Additionally, I briefly examine the Antiterrorism and Effective Death Penalty Act of 1996, a scaled-down version of the omnibus bill that passed in April of 1996. I also discuss how the United States may learn valuable lessons from the British army's assessment of what its own role should be in the domestic affairs of Britain following its involvement in Northern Ireland. Finally, I discuss how the United States may also use the British experience as a way of thinking about the future. The United

State may study the British example of combining vigorous anti-terrorism legislation with the domestic use of the military as a analytical tool. The United States may someday have to respond more forcibly to a growing domestic terrorist threat. In doing so the U.S. may eventually reach the point when the restriction imposed by the Posse Comitatus Act may be repealed. This comparative analysis may provide some insights as to the direction in which the United States may choose to travel in its efforts to adjust to a potentially changing domestic security environment.

II. THE HISTORICAL MILITARY RESPONSE OF THE UNITED STATES TO DOMESTIC POLITICAL TERRORISM

The United States' legislation on the Presidential use of the military to combat domestic violence has come under close scrutiny as a result of recent terrorist activities within the United States. An early version of the latest antiterrorism bill enacted proposed the elimination of the Posse Comitatus Act of 1878.² Although this proposal was dropped from the final version, it raised the question of the continued utility of the Posse Comitatus Act and whether the future security environment might dictate the need to reevaluate the domestic role of the military. This chapter examines the history of related legislation that has brought the United States to its current policy on the use of the military.

A historical review will reveal that the current restrictions imposed on the President derive from legislation that dealt with a security environment totally different from that which the United States might face in the near future. As a result, it remains to be seen whether the Posse Comitatus Act is likely to be revised under the weight of current and potential future terrorist acts.

²On February 10 1995, a counterterrorism bill drafted by the Clinton Administration was introduced in the Senate as S. 390 and in the House of Representatives as H.R. 896.

A. SHAYS' REBELLION

Historians point to Shays' Rebellion in 1786-1787 in western Massachusetts as the catalyst for the debate which helped shape the Constitution in defining the power of the states, the Executive and the people regarding the use of the military in enforcing the domestic laws of the Union.³

In 1786, the state of Massachusetts was divided in two as far as its economic structure was concerned. In the east, the population was composed of individuals involved in mercantile interests. These individuals dominated the political makeup of the state, monopolizing both the legislative and judicial branches. Conversely, the west was populated by farmers who were suffering from economic depression, scarcity of circulable currency, disproportionate taxes, excessive legal fees, unfair court practices, and a large number of property seizures.⁴ As a result of this imbalance the western farmers came together in protest in order to prevent the state's courts from convening to issue indictments against them.

Daniel Shays, a western farmer and former Captain in

³The earliest history of the affair is George Minot, The History of Insurrections in Massachusetts (Boston: James W. Burkett& Company, 1810) A popular account is Marion L. Starkley, A Little Rebellion (New York: Alfred A. Knopf, 1955). The best short scholarly account is in Robert J. Taylor, Western Massachusetts in the Revolution (Providence: Brown University Press, 1954).

⁴Robert W. Coakley, The Role of Federal Military Forces in Domestic Disorders 1789-1878 (Washington D.C.: Center of Military History, United States Army, 1988), 4.

George Washington's army, reluctantly came to lead the group of protesting farmers. A ground swell of support for the dissidents began to grow, due in part to the actions of the Massachusetts government which suspended the writ of *habeas corpus* and halted the unlawful assemblies. However, the state's coercive actions only served to strengthen the farmers' resolve and inadvertently brought sympathy from the state's militia who were called to suppress the rebellion.

News of the rebellion had spread throughout the Confederation and conservatives began to realize that if a rebellion in one state could not be quelled by its own militia, then perhaps the same could happen in their states. The leaders among the Confederation of States indeed had cause for concern. George Washington, aware of the potential threat, stated that, "Commotions of this sort, like snow-balls, gather strength as they roll, if there is no opposition in the way to divide and crumble them."⁵

The protection of Massachusetts proceeded on two fronts, at the federal and the state level. Henry Knox, the Secretary of War and a Massachusetts citizen, realizing that the state may have lacked the ability to protect itself from the

⁵Coakley 5, citing John C. Fitzpatrick, ed., *The Writings of George Washington from the Original Manuscript Sources, 1745-1799*, 39 vols. (Washington, D.C.:Government Printing Office, 1931-44), 26:27.

rebellious citizens, and concerned with the fact that Massachusetts possessed one of the more important national arsenals, asked Congress to enlist additional men into the army from New England to aid in the protection of the Massachusetts government. Recognizing the potential threat to the Confederation, Congress quickly approved an additional 1,100 men to the ranks of the army, bringing the total number of soldiers in the Confederation to 2,000 men. However, the process would proceed far too slowly to be of immediate help to the Massachusetts government, thus leaving the state the responsibility of quelling the rebellion and bringing stability back to the Confederation.

Massachusetts amassed a militia of nearly 5,000 men and faced the dissident citizens at the Springfield arsenal:

Shays once again appeared at Springfield on 25 January 1787 with a contingent of about 1,500 men, this time to demand arms from the national arsenal. He was confronted by General Shephard with about 900 Hampshire County militia armed with muskets and cannon from the arsenal. Shepard's position was precarious for he had no assurance that he could rely on men whose friends and neighbors were in Shay's ranks. He chose the most impersonal way to deal with the matter-the use of artillery. When Shay's men refused to halt at his command, Shepard first ordered cannon fired over their heads. As they continued to advance, he directed several rounds in their midst. Three men fell dead, another mortally wounded; the rest, unprepared to face artillery fire, fled in panic.⁶

⁶Coakley, 6.

B. CONSTITUTIONAL DEBATE ON THE POWER OF THE MILITARY TO INTERVENE IN DOMESTIC DISTURBANCES

Shays' Rebellion quickly lost its momentum and came to a quick end as the Massachusetts government, through coercion and concession, was able to reassert its authority. However, the incident stirred in the minds of many the danger the rebellion caused to the stability of the Confederation. Many had reasoned that had the rebellion been headed by a more dynamic and capable leader, the outcome may have been different. This underlying fear brought forth the support of both liberals and conservatives in providing for a military means to protect the governmental integrity of the Confederation. George Washington commented that the rebellion should serve as a wake-up call:

What stronger evidence can be given of the want of energy in our governments than these disorders? If there exists not a power to check them, what security has a man for life, liberty, or property?...Thirteen Sovereignties pulling against each other, and all tugging at the federal head will soon bring ruin on the whole; whereas a liberal, and energetic Constitution, well guarded and closely watched, to prevent encroachments, might restore to us that degree of respectability and consequence, to which we had a fair claim and the brightest prospect of attaining.⁷

Thus, at the first Constitutional Convention, the question was not whether the new government would possess a

⁷Ibid., 7.

greater ability to protect itself, but in what form and under whose control the power would fall.

With few exceptions the convention delegates accepted the premise that the new government must possess a coercive power that the Confederation had lacked and that it must be capable of exercising this power in its own right without having to rely on the state governments.⁸ Implicit in this power was the domestic use of the military, but with clearly defined limitations.

The new government wanted to provide the new Union with three assurances:

1. Assuring that no state could itself defy the authority of the federal union operating within its prescribed sphere; enforcing the "laws of the union" against combinations of individuals when civil law should fail.

2. Protecting the states themselves against internal violence, rebellion, and insurrection against their authority.

3. Assuring the states of "a republican form of government."⁹

When the final version of the Constitution was ratified, the power to control the use of the military domestically was eventually vested in the hands of the President of the United

⁸Ibid.

⁹Ibid., 7-8.

States.¹⁰

C. THE CALLING FORTH ACT OF 1795

The Calling Forth Act of 1795, commonly referred to as the Law of 1795, was the first law which attempted to clarify the powers of the President in the use of federal troops in the execution of the laws of the Union. The law arose out of a reevaluation of the Calling Forth Act of 1792, the first law which delegated to the President powers to intervene in domestic disorders with the use of military force in the form of the militia.

The first section of the Law of 1795 dealt with the President's power to call forth the militia to counter an invasion or insurrection against a state's government. The section limited in scope the power of the President, only allowing him to respond to threats posed against a state's sovereignty, but not against the sovereignty of the federal government. Furthermore, the President could only utilize the militia in cases in which the threat originated from foreign nationals or Indian tribes. In those cases where the threat was posed by the citizens of the state itself, the President could only call forth the militia of another state for

¹⁰Article II, Section 2., of the Constitution, reads in part, "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;...".

assistance, and could only do so upon the request of the legislature or Executive of the state deemed to be in need of assistance.

The first section of the law addressed the fears of state legislatures in regards to limiting the unencumbered power of the President to call out the militia to quell domestic violence in a state regardless of the civil rights of its citizens. Yet, it was the second section of the law which seemed to elicit more serious debate over the powers of the President.

The second section was controversial in that it was to help decide the power structure between the Executive and the States as to when the President could intervene in a State's domestic affairs. The President wanted more authority than the States were willing to give. The debate centered on the question of whether the President should be able to interfere in a state's internal affairs when there existed no request for assistance from that state. Whereas the first section dictated that the president must receive a request from a state's government before intervening in the domestic affairs of that state, the second section dealt with the power of the President to call forth the militia to "execute the laws of the Union," when no request from a state existed:

Whenever the laws of the United States shall be

opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by ordinary course of judicial proceedings, or the powers vested in the marshals by this act, the same being notified to the President by an associate justice, or the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed. And if the militia of the state, where such combinations may happen, shall refuse or be insufficient to suppress the same, it shall be lawful for the President if the legislature of the United States be not in session, to call forth and employ such numbers of the militia of any state or states most convenient thereto, as may be necessary, and the use of the militia, so to be called forth, may be continued, if necessary, until the expiration of thirty days after the commencement of the ensuing session.¹¹

This section attempted to delineate between the sovereign powers of the state and the responsibility of the President to protect the Union as a whole.

However, in a further attempt to find a balance between the Executive, the state and the citizen, limiting legislation was added in the third section of the law, requiring the president to first provide a cease and desist order to the recalcitrants before being authorized to use federal force:

That whenever it may be necessary in the judgment of the President to use the militia force hereby directed to be called forth, the President shall forthwith and previous thereto, by proclamation, command such insurgents to disperse and retire peaceably to their respective homes, within a

¹¹*1 Statutes at Large 264. An Act to provide for calling forth the militia, to execute the laws of the Union, to suppress insurrections and repel invasions.*

limited time.¹²

With the passage of the Calling Forth Act of 1792, a legal precedent was established around which all other legislation in regards to presidential powers in the use of federal troops domestically would evolve. The Calling Forth Act of 1795 was the outcome of the first reinterpretation of the 1792 law. This reinterpretation came as the result of the Whiskey Rebellion of 1794, for it was during that rebellion that President George Washington would use federal forces to suppress the uprising of the citizens of western Pennsylvania who refused to comply with the federal excise tax on liquor and stills.¹³

The President, having first attempted a number of political options, turned to the military to quell the rebellion. A military expedition to western Pennsylvania was mounted under the control of General Henry Lee. The instructions that Washington gave to General Lee were significant in that "they h[e]ld an important place in the whole history of federal military intervention in domestic disorders in the United States, for they established the vital

¹²Ibid.

¹³A detailed discussion on the origins and outbreak and eventual quelling of the Whiskey rebellion can be found in Coakley, Chapter two: The First Precedents: Neutrality Proclamation and Whiskey Rebellion and Chapter three: The Whiskey Rebellion: The Military Expedition.

principle that the purpose of the military was not to supplant but to support civil authority and that there should be no martial law or military trials of offenders."¹⁴

Washington stated that the purposes for which the militia was called forth in the Whiskey Rebellion were twofold:

1. To suppress the combinations which existed in some of the western counties of Pennsylvania in opposition to the laws laying duties upon spirits distilled within the United States and upon stills.

2. To cause the laws to be executed.¹⁵

Additionally, he went on to state that the objectives would be accomplished using a combination of military force and judicial proceedings. The object of the military force would also be twofold:

1. To overcome any armed opposition which may exist.
2. To countenance and support the civil officers in the means of executing the laws.¹⁶

With those orders it became clear that the military was expected to assist civil authorities in the execution of federal laws, but only under the condition that they not take on the primary role of law enforcers, but rather assist those

¹⁴Coakley, 54.

¹⁵*American State Papers, Misc.*, 1:112-13.

¹⁶*Ibid.*

who enforce the laws.

The first use of the military against citizens of the United States proved to be a successful venture. The Whiskey Rebellion was put down without shedding blood, and with few exceptions, the laws of the Union were executed by civil authorities under the protection of federal troops.

The result of the Whiskey Rebellion was the reaffirmation of the power of the President to utilize federal troops to safeguard the laws of the Union. In George Washington's eyes, the principle had been sustained that federal laws would be enforced and that no turbulent faction could set them aside at its whim.¹⁷

Washington's appropriate and restrained use of troops so impressed Congress that they reenacted the Calling Forth Act of 1792.¹⁸ Owing to the fact that Washington had not abused his authority in calling out the militia or in any way misused the forces under his command, Congress amended the act, known as the Calling Forth Act of 1795, deleting the requirement that

¹⁷Coakley, 65-66.

¹⁸In response to states' continued fear of a standing army, harking back to the days of the British Red Coats, in his scrupulous regard for the law of 1792, Washington relied completely on the militia for the expedition, despite some suggestions that he should at least supplement them with regulars...He satisfied himself, however, with a renewal of his old appeal that Congress establish a truly "well regulated militia," giving no hint that reliance on regulars might be less expensive and certainly more speedy and efficacious in instances of this sort. Coakley 67.

the President obtain a judicial certificate before using the military to deal with combinations against the laws "too powerful to be suppressed by the ordinary course of judicial proceedings" as well as the provision that he could only act when Congress was not in session. The Whiskey Rebellion thus resulted in the establishment of both a permanent law and a precedent for all future use of federal military for domestic disorders.¹⁹

D. THE LAW OF 1807 AND THE BURR CONSPIRACY

With the law of 1795 firmly in place, the next amendment to the power of the President to call forth military troops, came with his ability to call forth regular troops as well as the militia to enforce federal laws. Up to this point, the President had been limited in his ability to utilize both the militia and regulars in areas he deemed necessary. The Calling Forth Act of 1795 had given the President the power to call forth the militia only to quell domestic disturbances. In addition, the Neutrality Act of 1794 allowed him to call forth either the militia or the regulars to preserve the neutrality of the United States. The Law of 1807 would merge the two, allowing the President to utilize federal troops in all cases authorized under the law of 1795.

In the early months of 1806 a conspiracy was being

¹⁹Coakley, 68.

launched by Aaron Burr, the former Vice-President of the United States under President Thomas Jefferson who had set his sights on acquiring land, separating it from the rest of the Union and becoming its new chief executive:

The estimate of Burr's intentions...would have it that the former vice president hoped to raise a force in the West and float it down the Mississippi to New Orleans, timing his arrival with an uprising of dissident elements in the city. Once having seized power in New Orleans, the principal outlet for commerce of the entire trans-Appalachian West, he hoped, with the cooperation of [Brigadier General James Wilkinson, then commanding general of the U.S. Army in the West] and of either British or American elements, both to separate that section from the Union and to mount an expedition against West Florida and Mexico to add these Spanish domains to his realm.²⁰

Upon learning of Burr's intentions, President Jefferson set out to protect the Union by stopping the insurrections that he felt would be necessary in order for Burr to carry out his plot. Jefferson resorted to two existing laws. The Calling Forth Law of 1795 gave him the authority to call forth the militia in the various states along the route Burr would have to travel to reach New Orleans. The second law utilized was the Neutrality Act of 1794. This law was enacted to allow the President to use both the militia and regular forces for the sole purpose of enforcing the United States' neutrality in conflicts where the United States was at peace with either of

²⁰Coakley, 78.

the warring parties. The act allowed the President to utilize the military domestically to stop any citizen or combination of citizens who might attempt to wage an independent campaign against a country with which the United States was at peace:

In every such case it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States or of the militia thereof as shall be judged necessary for the purpose of taking possessions of, and detaining any such ship or vessel... and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territory of the United States against the territories or dominions of a foreign prince or state, with whom the United States are at peace²¹.

With Burr's plans to conduct raids against Spain, a country with which the United States was at peace, the President crafted his response around the Neutrality Act in order to bring to bear all the forces at his disposal, both regulars and the militia.

As Burr headed down the Ohio and Mississippi rivers, militia of several states lay in wait. Though crafty and elusive, Burr's forces had dwindled from 1,500 men and twenty-eight boats down to ten boats and roughly 100 men by the time he reached the state of Mississippi. Having learned that he had been double-crossed by General Wilkinson and having

²¹2 *Statutes at Large*, 54.

learned that a large force awaited his arrival in New Orleans, Burr surrendered to the Mississippi militia.²²

Jefferson had successfully brought to an end Burr's conspiracy through the use of both the militia and regular forces. Yet Jefferson was troubled by his lack of authority to use regulars in a domestic insurrection, which he rightly deemed the Burr conspiracy to be.²³ Jefferson drafted, sent forth to Congress and received the passage of a bill which gave him the authority to call forth both the militia and the regular forces in the quelling of domestic insurrection. The Law of 1807 provided:

That in all cases of insurrection or obstruction to the laws, either of the United States or of any individual State or Territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purpose, such part of the land and naval force of the United States as shall be judged necessary, having first observed all the prerequisites of the law in that respect.²⁴

E. "LINCOLN'S LAW", THE LAW OF 1861

Once Jefferson secured the Law of 1807, which permitted the use of regular military forces in all cases where the Law

²²Though Burr surrendered, subsequent trials failed to produce any convictions against him.

²³Coakley, 83.

²⁴2 *Statutes at Large*, 443.

of 1795 permitted only the use of the militia, presidents had a choice to opt for either forces in a variety of situations. Invariably presidents chose to utilize regulars. This was done largely to ensure that the forces being used would not be influenced by partisan loyalties that existed among the various militia of the states. In subsequent presidencies, under the authority of the Law of 1807, the predominant choice was the use of regulars in such incidents as the Chesapeake and Ohio Canal Riots in 1834, the Dorr Rebellion in 1842 and the Kansas abolition skirmishes between 1854-1857.²⁵

It wasn't until the Civil War that a change in the laws redefined the powers of the President in regards to the use of federal forces. As the southern states began their movement to secede from the Union, President Abraham Lincoln called upon Congress to grant him greater latitude in his ability to use the military to quell the rising rebellion. Congress responded by passing legislation on 29 July 1861 that left intact the sections of the 1795 and 1807 laws requiring the request of states before the President could commit troops within any given state. However, the new legislation vastly strengthened the President's authority to use both the militia

²⁵For a detailed description of these incidents see Robert W. Coakley, "The Jacksonian Era", pp. 91-110, "The Patriot War and Dorr Rebellion", pp. 119-127 and "Trouble in Kansas: First Phase", pp. 145-165 in The Role of Federal Military Forces in Domestic Disorders 1789-1878.

and regulars to suppress insurrections and execute the laws of the Union. The pertinent section of the new law read:

That whenever, by reason of unlawful obstructions, combinations or assemblages of persons, or rebellion against the authority of the government of the United States, it shall become impracticable, in the judgement of the President...to enforce, by the ordinary course of judicial proceedings, the laws of the United States with any state territory...it shall be lawful for the President...to call forth the militia of any or all of the states of the Union, and to employ such part of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws...or to suppress such rebellion in whatever state or territory thereof the laws... may be forcibly opposed or the execution thereof forcibly obstructed.²⁶

The law amended the previous laws in that it added "rebellion" specifically to the obstructions and combinations that could be acted against under the law of 1795. It also entrusted the decision to use military force to the "judgement of the President" whenever he deemed it "impracticable" to enforce the law by ordinary means (the 1795 law had merely made it lawful for him to do so), and omitted any reference specifically to the powers of the federal marshals under the act as a means of enforcement short of the use of military force.²⁷

The new law vastly strengthened the powers of the

²⁶Coakley, 228.

²⁷Ibid.

President that were authorized under the laws of 1795 and 1807. The new law, designed to prevent the initiation of war, became in reality the statutory basis for federal troop intervention in lesser disturbances and it has remained the basic statute authorizing the President to employ troops to enforce federal law that was to be used in such instances as Little Rock, Arkansas, and Oxford, Mississippi, in the twentieth century.²⁸

Despite the legislation, war did eventually break out, and as such the role of the military during the war, though domestic in nature, is not pertinent to this discussion on the role of the military during peace time. Therefore, the next issue of interest is how the military was employed domestically in one its first post-war domestic assignments in law enforcement.

F. THE USE OF THE MILITARY IN BATTLING THE KU KLUX KLAN 1866-1871

The decision to use federal troops to combat the threat of the Ku Klux Klan offers a historical look a precedent-setting legislation. The Presidential decision-making process of the late 1860's may be applicable today with the emergence of radical right-wing groups.

In 1866 several young men in Pulaski, Tennessee organized

²⁸Ibid., 228-229.

themselves into what was known as the Ku Klux Klan. Members of the secret organization harassed and terrorized blacks, especially those who showed a penchant for independent thinking. Following the Civil War, and with the passage of the Reconstruction Acts, the Klan developed the political objective of waging a violent campaign against the local Republican parties in order to save its traditional way of life.

Within two years, offsprings of the original Klan sprung up in Alabama, North Carolina, Texas, Louisiana, and Mississippi. The violence associated with these groups became so intense that the legislatures of many southern states found their civil law enforcement agencies lacking in their ability to handle the threat alone. From 1868 to 1871 Republican governors in the South found themselves confronted with combinations "too powerful to be suppressed by the ordinary course of judicial proceeding."²⁹

Hardly had the new Republican state governments been installed than the legislatures of Alabama, Florida, Louisiana, and Tennessee had passed joint resolutions in keeping with the constitutional formula, asking the president for military aid in subduing the Klan.³⁰ Though President

²⁹Coakley, 300.

³⁰Ibid.

Andrew Johnson refused the state government's requests for direct intervention of federal troops, he did evoke the little used Cushing Doctrine of 1854. This doctrine gave U.S. marshals and county sheriffs the right to "command all necessary assistance" within their respective districts, drawing on both military and civilians alike to serve on the *posse comitatus* to execute legal process.³¹ Johnson chose to accept his Attorney General's interpretation of the doctrine that allowed for an indirect way for troops to be deployed to a state without the formalities of submitting a request to the President. Johnson preferred this method since it enabled him to respond to a threat without appearing dictatorial in the use of force.

The War Department, upon receiving word of the President's intentions to make the military available for domestic use, began to prepare its commanders for the task at hand:

The commanding officer summoned to posse duty would have to judge for himself the necessity and legality of the call and limit his action

³¹ Caleb Cushing, Attorney General under President Pierce, issued the Cushing Doctrine. Cushing based his doctrine on that laid down by British Chief Justice William Mansfield in a case arisen out of the Lord Gordon Riots in 1780. It was essentially a doctrine of British law that had previously not been recognized as applying in America, at least as far as the military was concerned. The Cushing Doctrine would allow a U.S. marshal to call on federal military forces in his district without reference to the president whatsoever.

absolutely to "proper aid in the execution of the lawful precept exhibited to him by the marshal or sheriff." If time would permit, indeed, every demand from a civil officer for military aid should be referred to the president and "in all cases the highest commander whose orders can be given in time to meet the emergency will alone assume responsibility for the action." And commanders were admonished to make timely disposition of their forces to anticipate trouble and preserve the peace, instead of relying on commitment under the *posse comitatus* doctrine.³²

This order seemed to indicate that the military could actively participate in law enforcement activities against the Klan under the *posse comitatus* doctrine, but they would require the orders of the President to be involved in any large scale disturbances, and then only upon receipt of a request from state legislatures or Executives. Armed with the power of the *posse comitatus*, the states attempted to fight the Klan utilizing the combined powers of U.S. marshals and the military.

The election of Ulysses S. Grant as President of the United States in 1868 brought to power a man more robust in his intentions to utilize the military in the fight against the Klan. Armed with an official report of one his senior generals which stated in part that, "There can be no doubt of the existence of numerous insurrectionary movements known as the 'Ku Klux Klan,' who, shielded by their disguise, by the

³² Coakley, 301.

secrecy of their movement, and by the terror they inspire, perpetrate crime with impunity."³³ Grant asked for and received legislation giving him stronger powers to combat what he considered to be violent opposition to the policies of the United States government guaranteeing equal rights to all citizens.³⁴

The new legislation was designed to enforce the Fifteenth Amendment permitting blacks to vote. Known collectively as the Enforcement Acts, the legislation made a number of crimes federal offenses and as such made the perpetrators subject to the laws of federal jurisdiction. The first of the three acts which composed the Enforcement Acts made it a federal crime for two or more people to use coercion as a means to prevent citizens from voting. The second act provided for the appointment of supervisors of elections and made it a federal crime to prevent them from carrying out their duties.

Among the most important of the three pieces of legislation that composed the Enforcement Acts was the third act, which imposed strict federal penalties upon anyone who acted under cover of state law to deprive a citizen of his civil rights under the Fourteenth Amendment or conspired to

³³ Coakley, 307, citing Terry to AG, 14 Aug 69, *SW Rpt*, 1869, pp. 89-94. James E. Sefton, The United States Army and Reconstruction, 1861-1865. (Baton Rouge: Louisiana State Press), p. 200.

³⁴*Ibid.*

"obstruct the U.S. Government; hinder the execution of its law; intimidate its officers or any people testifying in court; or travel in disguise upon the public highway or upon the premises of any person or class to deprive them of their rights."³⁵

Section 3 of the third act, which was to become part of the permanent law of the United States governing military intervention to "enforce the laws of the union" reads as follows:

That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such state of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act, and the constituted authorities of such state shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such state of equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States, or the due execution thereof, or impede or obstruct the due course of justice under the same, it shall be lawful for the President, and it shall be his duty to take such measures, by the employment of the militia or the land forces of the United States, or either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations; and any person who shall be arrested under this and the preceding section shall be delivered to the

³⁵Coakley, 309.

marshal of the proper district, to be dealt with according to the law.³⁶

With the power of the Enforcement Acts, the President was able to utilize the military, upon proclamation of martial law, to effect the arrests of several hundred Klan members and try them in military courts.

The military was generally successful in assisting the civil authority in breaking up the Klan in several states. Providing marshals the necessary manpower to cover a large geographic area and assist with arrests of Klansmen, the army's use as a posse was very effective. While the Klan still remained as an entity well past 1871, due in part to the lack of federal forces needed to weed out every member, the President and the military were able to show their resolve in protecting the civil liberties of all citizens.

G. THE END OF MILITARY PARTICIPATION IN CIVIL LAW ENFORCEMENT: THE POSSE COMITATUS ACT OF 1878

With legislation firmly in place, few congressmen questioned President Grant's right to use military force in domestic disturbances. However, several did raise questions about the frequent use of posses under the Cushing Doctrine, noting that command of Army forces fell into the hands of marshals and sheriffs without any approval of the Commander in

³⁶Ibid., 309-310.

Chief.³⁷ As a result, the military became pawns in several power struggles. An example is the use of the military in the South. The Southern Democrats, in order to protect their interests, had encouraged the President to utilize the military under the Fugitive Slave Act to return escaped slaves back to them, only to find a few years later the same troops still in southern states enforcing unpopular laws and supporting Republican state governments supported by a Republican President. It was this frequent and subsequent misuse of the military which would change the role they would play in all future responses to domestic political terrorism.

The Presidential election of 1876 was full of political maneuvering. The candidates were Samuel Tilden of the Democratic party and Rutherford B. Hayes of the Republican party. The Republicans had remained in control of most of the southern states' legislatures following the Civil War and it was a foregone conclusion that Hayes would win the presidential elections with the backing of the Republican political machine. Tilden's victory came as a great surprise to everyone. The north was mortified to learn of the election results and vowed not to recognize the results, thus creating a potential constitutional crisis.

With a crisis looming, Democratic congressmen from

³⁷Ibid., 343.

several southern states met behind closed doors with members of the Republican party in order to reach a compromise. The Democratic congressmen argued that military troops stationed in southern states were being used to harass civilians, not only during elections, where they allegedly intimidated voters into voting for Republican candidates, but also interfered unnecessarily with civil governments in the states. In the case of Louisiana, troops had even removed an entire legislature and replaced it with one politically more acceptable to the radical Republican federal government.³⁸

A number of Republican congressmen sympathized with the Democratic coalition, and a number of states were still sensitive to the sovereignty issue. As a result, a compromise was worked out wherein several Democratic congressmen would throw their support behind Hayes in exchange for a promise that federal troops would be removed from the south. The general public knew nothing of the compromise and were none the wiser when the election results proclaimed that Hayes had won the presidency.

Although Hayes thus won the election, the 45th Congress' majority resided in the hands of the Southern Democrats. Less than two years after the election, a rider was attached to the Army appropriations bill which stated:

³⁸Ibid., 342.

From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years, or by both such fine and imprisonment.³⁹

Thus with its passage on 18 June 1878, the Amendment known as the Posse Comitatus Act brought to an end the participation of federal military forces in combating domestic political terrorism, a practice which had existed for the first ninety years under the Constitution.

It is interesting to reflect upon the elections of 1876 and ponder whether, had Hayes won the election outright, would the Posse Comitatus Act now be among the laws of the United States. As tenuous as the answer may be, the law has withstood constitutional and political challenges to date.

H. ANALYSIS

In regards to the domestic use of the military, the legislative history of the United States had progressed along

³⁹20 *Statutes at Large* 145-52. Today it is Section 1385 of Title 18 of the US Code.

a consistent path for nearly one hundred years. The founding fathers, mindful of the British use of the Red Coats to enforce the unpopular measures of the British Parliament, made explicit efforts to prevent the same from occurring in the fledgling United States.

Congress proceeded slowly in its efforts to define the authority of the President in calling forth the militia and regular forces to quell domestic disturbances. Congress had to maintain the delicate balance between the federal government's right to protect the Union and the states' right to maintain their sovereignty in internal affairs.

Presidents had shown restraint and good judgement in their use of the military under the limited authority granted to them. Accordingly, Congress responded by slowly granting the President additional powers. Progressively, the power of the President expanded from simply being able to call forth the militia to overcome resistance to federal or state authority as we saw in the Calling Forth Act of 1795, to the outright authority, found in the "Lincoln Law", to call forth federal forces when in his "judgement" the President deemed it necessary to use them to maintain the domestic tranquility of the Union.

The historical record shows that it wasn't abuse of power by the presidents that eventually led to the imposition of the

Posse Comitatus Act. Rather, it was the loose way in which presidents kept track of the power they delegated to those under them in the use of the military that pushed Congress towards changing the laws. By the time Reconstruction arrived there existed prescribed means to circumvent the President in obtaining the use of the military. The Cushing Doctrine gave federal judges and marshals the means to employ the military in a number of circumstances without resorting to presidential permission, and it was during these employments of troops where accountability was lost. However, as is well known, accountability rests with the senior leadership and in the cases discussed prior to Posse Comitatus, the accountability rested with the President.

When Congress acted to prevent the use of the military domestically it was more in response to *how* the troops were being used rather than *whether* they should be used. But it was the Executive which suffered the backlash, having subsequently to govern under the restrictions of the Posse Comitatus Act.

Future domestic security requirements may require the nation to reexamine the current restrictions on the domestic use of the military. If terrorist events such as the World Trade Center and Oklahoma bombings continue, Congress' concerns may be the exact opposite of those arising during the original debate on Posse Comitatus. The resultant question may

be, not how the military will be used, but rather, why are they not being used.

III. COMPARATIVE ANALYSIS OF THE BRITISH LEGISLATIVE, JUDICIAL AND MILITARY RESPONSE TO AN EMERGING DOMESTIC TERRORIST THREAT: THE IRISH REPUBLICAN ARMY

The United States' legislative history shows an increasing tendency to limit the President's ability to utilize the military domestically to combat violence. In contrast to the United States experience, the British have chosen to increase their government's authority to respond to domestic threats with armed force. The value of a brief comparative study between the U.S. and British experience is its exemplification of how a democratic society similar in nature to the United States, can and will dramatically adjust its legislative, judicial and military strategies in an attempt to maintain domestic tranquility. While the differences in the constitutional structures of the United States and Great Britain may appear, on the surface, to be too wide to serve as accurate predictor of future U.S. responses to domestic terrorism, the British experience still serves as a good case study from which to draw a number of ideas which the U.S. might heed in the not-too-distant future.

As mentioned earlier, the World Trade Center and Oklahoma City bombings have opened the collective eyes of the country, raising renewed questions in regards to the domestic security of the United States. A question that may be asked is, how

many more Oklahoma City-type bombings will have to occur within the United States before the citizens are willing to accept a change in the government's policy on the use of the military? Will both the public and politicians demand such a change should bombings start occurring, for example, once a month? Will the President demand the unrestricted authority to bring to bear all resources, including the military, against a domestic terrorist threat?

The British government faced similar questions in Northern Ireland. After the partition of Ireland in 1921, the Irish Republican Army began a systematic, though erratic terrorist campaign to remove the British government from Northern Ireland and reunify the island.

The passage of the Government of Ireland Act in 1920, not only formally created Northern Ireland, it also provided the legal framework which gave Northern Ireland its authority to be self-ruled under the auspices of the British Government. The Act transferred legislative power from Westminster, Britain's Parliament, to Stormont, the new Parliament of Northern Ireland. Despite this expansive grant of power, Westminster reserved for itself authority over such areas as foreign policy, defense, taxation, external trade, and all

matters relating to the Crown.⁴⁰

With the Stormont parliament in place, the British government's attitude towards the terrorist situation in Ulster was one of ignorant bliss. As long as violence remained confined to Irish soil, and Stormont kept it to acceptable levels, the British were satisfied with staying out of Ulster's internal affairs.

However, by 1969, the British view was that violence in Ulster had crossed the threshold of what was acceptable. This occurred in connection with the civil rights movement, and initiated the period known as the "Troubles."

The Troubles overwhelmed both the capabilities of the Royal Ulster Constabulary, the national police force of Northern Ireland, and of the Stormont government itself. Once this occurred, the British government was forced to reenter the picture, first in 1969 with the introduction of army troops to the area, followed by a series of legislative and judicial reforms culminating in 1972 with the decision to dissolve the Stormont Parliament and institute direct rule from Westminster.⁴¹

This chapter begins with a brief history of the IRA,

⁴⁰John E. Finn, Constitutions in Crisis: Political Violence and the Rule of Law (New York: Oxford University Press, 1991), 51.

⁴¹Since 1972, Ulster has returned 12 members of parliament to the 651- member British Parliament at Westminster.

examining their motives and actions surrounding their efforts to reunify Ireland. The second section will look at the legislative measures employed by the British parliament, and the final section deals with the British decision to escalate their use of force in combating the IRA, progressing from the use of the police to the regular army to finally using the military's elite unit, the Special Air Service.

A. THE IRISH REPUBLICAN ARMY IN NORTHERN IRELAND

The Irish Republican Army's origins go back to 1858 with the Irish Fenians. One of the Fenians' goals was the forceful separation of Ireland from Great Britain, and the creation of an Irish republic. The IRA carried out the paramilitary functions of the organization. Although their first attempts in 1867 ended with poor results, they continued their fight, subsequently in the Easter Rising of 1916 and the Anglo-Irish war.

During that war, the IRA's assault against the British continued for a number of years until a cease-fire was agreed to in 1921 in order to enter into negotiations with the British government. Arising out of those negotiations was the Government of Ireland Act which created an independent Republic of Ireland. However, to the great dismay of many Irishmen, the Act also partitioned six counties in the north creating Northern Ireland as an entity which was to remain

part of the United Kingdom.

The partition created a Northern Ireland that was populated with a majority of Protestants, leaving the minority Catholics fighting for basic civil rights that were being denied them through prejudicial treatment from the majority. Consequently, the IRA then took up two causes: reunifying the two Irelands into one Republic and fighting the ruling majority in an attempt to gain a measure of equality within Ulster.⁴²

The IRA began their mission in earnest in Northern Ireland in the late 1930's. In 1939, the IRA issued an ultimatum to the British to withdraw from Irish soil. When the British government failed to respond to their demands, the IRA commenced terrorist attacks in both Northern Ireland and on the British mainland. A series of bombings engineered by the IRA resulted in the deaths of five people⁴³. Unfortunately for the IRA, the bombings did nothing but stir anti-IRA sentiment throughout Britain and the Protestant community of Northern Ireland. The deaths caused by the IRA also produced a backlash from the Catholic communities who had not yet developed an appreciation for the terrorist tactics of the IRA.

⁴²Ulster is the commonly used collective name for the six counties which make up Northern Ireland.

⁴³John Magee, Northern Ireland: Crisis and Conflict (London: Routledge, 1974), 24.

Consequently, recruitment fell to a point where the continued existence of the group may have come into doubt.

Despite their dire state, the IRA pushed forward with their philosophy of violent revolt. In 1956, the organization launched another campaign, this time against the north's Stormont Parliament. The prolonged campaign of bombings, shootings and kidnaping lasted six years and cost the lives of six Royal Ulster Constabularies and eleven republicans, as well as causing damage in the millions of dollars.⁴⁴ The result of the campaign was again severe for the IRA. The violent manner in which they carried out their politics had not only alienated a large portion of the Catholic community but also caused a division within the organization itself.

By the early 1960's, the organization could be divided into two camps: those who wanted to create a unified Ireland at any cost and those who sought, not to reunify, but rather to transform Northern Ireland in a socialist state. Although the latter had the political support of Sinn Fein, their political wing, it would be the former which would continue the terrorist attacks. As a result of these internal disagreements, by the time the Troubles began in 1969, the IRA found it lacked both the weapons or the members to defend the civil rights activities and retaliate against the Protestant

⁴⁴Ibid., 24-25.

"abuses".

After suffering the embarrassment of not being able to defend the Catholic interests, a number of veteran members splintered off from the "Officials" of the IRA and created their own "Provisional" wing. The Provisionals supported a unified Ireland while the Officials supported Marxism, and even though in practice the two organizations have existed for twenty-five years, the Officials have only occasionally resorted to violence. The Officials' last operation occurred in 1979, with the murder of Prime Minister Margaret Thatcher's principal political advisor, Airey Neave. The Provisionals, on the other hand, have made no serious effort to hide their intentions, discussed later, of orchestrating a violent revolt against the British army who had entered Northern Ireland in 1969.

Along with their campaign of overt violence which included attacks on the military, the bombings of shops and offices and public buildings, the Provisionals employed the tactic of "winning the hearts and minds." Their strategy appeared to have been to draw the army into the Catholic ghettos, where their searching and interrogations would gain the movement general support from the population. The instituting of internment was probably their most successful achievement, for they calculated that the wholesale arrest of

members of the minority, many of whom were not involved in subversive activities, would stir up great resentment and provide the IRA with ideal conditions under which to operate.⁴⁵

B. LEGISLATIVE AND JUDICIAL RESPONSE

The British attempted to combat the IRA terrorist threat on three fronts, legislative, judicial and military, through the employment of three important legislative means: the Prevention of Terrorism Acts, internment and the use of supergrasses. The distinction between legislative and military responses, though useful analytically, is in practice blurred because often, for example in the case of internment, it is the army that implements legislative measures.

The judicial measures are found inherently among the legislation discussed, in part due to the British system of common law which relies heavily on precedents and the rule of law, in contrast with the United States' reliance on the Constitution and the Bill of Rights. Nevertheless, the British experience demonstrated that legislative and judicial reforms alone cannot solve the terrorism problem completely. While they do seek to limit the means that the terrorists may utilize, they do not address their motives.

⁴⁵Ibid., 26.

1. Prevention Of Terrorism (Temporary Provisions) Acts

The Prevention of Terrorism (Temporary Provisions) Act was enacted in 1974 by Westminster in response to increased terrorist acts conducted by the IRA.⁴⁶ With swift efficiency the Act was passed in Parliament after only two days of discussion. The purpose of the legislation was to impose serious restrictions on the activities and movements of suspected terrorists.

The PTA, which was considered temporary legislation at the time, has been renewed repeatedly: PTA 1976, PTA 1984 and its present form, PTA 1989. What separates the earlier versions from the present one is that each successive version had applied a more severe application of the measures of the previous PTA; additionally, the earlier versions were subject to review and were temporary; the latest version was set to be a permanent law.

The Prevention of Terrorism Act of 1989 consisted of three main parts. The first proscribed membership in organizations related to terrorist activities. The second part permitted the secretary of state to exclude any individual

⁴⁶On November 21, 1974, a bomb hidden in a pub in Birmingham killed 21 people and injured more than 180 others. The alleged perpetrators were arrested the same day and subsequently convicted, but the IRA had demonstrated that terrorism in the United Kingdom was no longer a problem neatly confined to the isolated province of Ulster. John E. Finn, Constitutions in Crisis: Political Violence and the Rule of Law (New York: Oxford University Press, 1991), 118.

from traveling from Great Britain to Northern Ireland or from Northern Ireland to Great Britain. The third part of the act extended the power of the police to arrest and detain suspects for questioning. Under the provisions of the act, a person who has been arrested could be held for 48 hours. The period of detention could be extended for an additional five days in all, bringing the total time to seven days if the authorities so desired.

a. *Proscription*

Proscription prevents any individual from being a member of, or supporting a prohibited organization. Currently the only two organizations to be proscribed are the IRA and the Irish National Liberation Army. Since the proscription provision only applies in Great Britain, it is notable in that it acknowledges that the IRA terrorist threat had grown to become a serious domestic concern.

Proscription is retained mainly for its presentational effect, a statutory reflection of public abhorrence and condemnation of those organizations, and for a possible deterrent effect on public display of support activities like parades or paramilitary processions.⁴⁷ Since it is merely a cosmetic statute, one that in most likelihood cannot be repealed since it would send an implicit message

⁴⁷Ibid., 441.

that the proscribed organizations have become "acceptable", it has been recommended that it be modified to allow for a greater freedom of speech for those who simply agree with the principles but not the actions of a proscribed organization.⁴⁸

The effect of proscription on the IRA's terrorist action in Great Britain has been minimal. Yet, however minimal, symbolic gestures do have a psychological impact on both the perpetrators and victims of terrorism, and Britain has been willing to try any measures which it feels may be effective.

b. Exclusion Orders

The second component of the PTA is the exclusion order. Under the PTA the secretaries of state for Great Britain and Ireland can exclude a person from entering any part of the United Kingdom, if it "appears expedient" to prevent acts of terrorism.⁴⁹

The procedures needed to execute an exclusion order are relatively simple. Upon receipt of a report on an individual from the National Joint Unit at New Scotland Yard, the Secretary makes a decision based on the contents of the report. Should the Secretary determine that there exists

⁴⁸See Finn p. 133 for a discussion on the conformity of proscription with constitutional principles.

⁴⁹Finn, 128.

sufficient evidence to support an exclusion order, one is issued.

The person who is subject to the order, the detainee, is afforded the opportunity to challenge the order before a hearing officer appointed by the government. The detainee has no legal right to hear the evidence against him or question any of the government's witnesses. The detainee does have a right to counsel, but since the proceeding is administrative and not judicial, there can be no judicial or independent review of an exclusion order through habeas corpus proceedings unless there has been an abuse of discretion or bad faith on the part of the secretaries of state.

The use of exclusion orders have been attacked by civil libertarians arguing that the process is ripe for abuse, arbitrary in its implementation, and lacking in its constitutional authority. Yet, those who are in charge of reviewing the laws find that terrorism creates the need for extraordinary measures. Lord Jellicoe defended the provision of the PTA:

I was invited in March 1982 to review the operation of the Prevention of Terrorism (Temporary Provisions) Act 1976. I took some time to consider my reply...partly because of my proposed terms of reference...required the acceptance of "the continuing need for legislation against terrorism." I satisfied myself...that some form of special legislation was indeed required to deal with the continuing threat posed by terrorism throughout the United Kingdom...I have since become

convinced...that if special legislation effectively reduces terrorism, as I believe it does, it should be continued as long as a substantial terrorist threat remains.⁵⁰

Between 1974 and 1984, 358 applications for exclusion were submitted, and 310 were accepted.⁵¹ However, because terrorists simply travel illegally, the effect of exclusion orders has resulted in more of a discussion of constitutionality than a significant impact on the prevention of terrorism.

c. Habeas Corpus

The third provision of the PTA deals with habeas corpus. Northern Irish police may arrest suspected terrorists under the act. The act allows the police to do so if they have reasonable suspicion that the individual has committed or has knowledge of a terrorist act. The police can then detain an individual for up to seven days before either releasing or charging him.

The individual has little judicial recourse during the detention period. Since the arresting officer need only have a "reasonable suspicion" of a crime; he need not make a specific charge. With that standard, the detainee has little

⁵⁰Ibid., 141.

⁵¹Clive Walker, The Prevention of Terrorism in British Law (Manchester, Eng: University Press, 1986), 69.

recourse to habeas corpus during his seven day incarceration. Additionally, the police can rearrest the suspect for another seven days, making the whole process, in a way, a form of internment. As with the other statutes of the PTA, the habeas corpus section raised more questions about constitutionality, but its deterrent effect was nil.

2. Internment

Internment is an executive measure. It involves detention without trial or charges of persons suspected of being a danger to the state. The British government adopted it on the mainland during the First and Second World Wars. Hitherto, they had resorted to this measure mainly in situations of colonial unrest and in disturbances in Ireland.⁵²

Although internment was a British concept, the new government of Northern Ireland retained the practice. The initial legislative authority to use internment in Northern Ireland came immediately after the partition of Ireland in 1921. The Stormont Parliament passed the Civil Authorities (Special Powers) Act (Northern Ireland) 1922, which contained the necessary authority to implement internment procedures. Regulation 23 of the Act conferred upon the Executive the power to arrest without warrant any person who had acted, was

⁵² Antonio Vercher, Terrorism in Europe: An International Comparative Legal Analysis (Oxford: Clarendon Press, 1992), 48.

acting, or was about to act in a manner prejudicial to the preservation of the peace or maintenance of order in Northern Ireland.⁵³

The specific mention of internment was found in regulation 23B of the Act, which provided that the Minister of Home Affairs, on the suspicion of a chief officer of police or police officer of high rank that a person had acted, was acting, or was about to act in a manner described above, [Regulation 23] could order restrictions, obligations, or the internment of that person.⁵⁴ It was this regulation, though slightly amended throughout the years, that provided the Stormont government its authority to use internment as a means to combat the IRA terrorist campaigns of 1921-2, 1938-9, 1956-62 and 1970-1.⁵⁵

To the British, the Troubles necessitated a stronger response from the mainland. Up until 1972 the Westminster government was willing to allow Stormont to handle the growing threat that the IRA presented. The Stormont government chose internment as one of their weapons of choice, and while Britain abolished the Stormont parliament in 1972, it kept internment until 1976.

⁵³Ibid., 19.

⁵⁴Ibid.

⁵⁵Ibid.

From the time British Army troops were formally introduced in the area, Westminster had the responsibility of security in Ulster. Prior to then, the British interest in the area had been limited, and the government was unaware of the level of terrorist activity that existed in the region.

Although the British had a long history in the use of internment, they were reluctant to employ the strategy in Northern Ireland. However, due to their unfamiliarity with the situation, they acquiesced to the wishes of the Stormont Government. In retrospect it has been said that the British government's reaction to the IRA terrorism that had developed in 1971 was uncomprehending, hesitant and piecemeal.⁵⁶

The policy was charged with controversy from the outset. Poor intelligence, in part a result of a lack of co-operation between the military and the police, led to the arrest of significant numbers of non-involved persons.⁵⁷ What ensued was an ineffective attempt to secure the internment of the leaders of the Provisional Irish Republican Army. Although the authorities may have lacked intelligence, IRA members did not seem to have the same problem. Several members, including the ringleaders, went into hiding during this period of time. As a result, many more individuals not involved with the IRA were

⁵⁶G. Davidson Smith, Combating Terrorism (London: Routledge, 1990), 167.

⁵⁷Ibid., 168.

interned than those who actually had a connection. Although Catholic communities were the targets of many of the security sweeps, Protestants suffered as well. The Army and the British government had not endeared themselves to the general population of Northern Ireland.

While it is clear that internment increased the alienation of the Catholic population, assisted the IRA with recruiting and support, and caused some crossover from the Official to the Provisional wing of the IRA, the question that must be addressed is whether the use of internment produced the desired effect of suppressing terrorist activities.

Statistical evidence shows that terrorist acts decreased during the period of 1971 through 1975. According to Christopher Hewitt, there is a negative corollary relationship between arrests for terrorism and terrorist violence, and that in Northern Ireland, the higher the number of terrorists interned, the lower the level of violence.⁵⁸ Additional evidence shows that, after peaking in 1972, both shooting incidents and explosions decreased between 1972 and 1975.⁵⁹ Statistical evidence would appear to bear out the observation that, while internment may have been a political mistake, in

⁵⁸Christopher Hewitt, The Effectiveness of Anti-terrorist Policies (Lanham: University Press of America, 1984), 86.

⁵⁹Tim Pat Coogan, The IRA (London: Fontana Paperbacks, 1982), 478.

the short term it was effective.

Although internment was abolished in 1976, the provisions contained in the arrest and detention portion of the PTA maintains a type of internment. Its use is carefully monitored and in contrast to the provisions of the 1970's the internee now has statutory recourse. Its effectiveness is still in question. While the use of internment appeared to have contributed to the decrease in violent acts, its use did not lead to the eradication of the IRA.

3. Supergrasses

The use of supergrasses (informants) represented the third shift in strategy since the Troubles began.⁶⁰ Its origin is a matter of some dispute, but most observers have concluded that the term "supergrass" derives from "snake in the grass" or from the slang phrase "grasshopper-copper."⁶¹ Although the system of supergrasses for terrorist offenses in Northern Ireland has recently been overturned by the judiciary, it represented one of the most controversial measures ever adopted to defeat terrorism.⁶²

⁶⁰Paddy Hillyard and Jane Percy-Smith, "Converting Terrorists: The Use of Supergrasses in Northern Ireland," Journal of Law & Society, vol. 11, no. 3 (Winter 1984): 339.

⁶¹Finn, 109.

⁶²Vercher, 93.

The supergrass strategy was born out of judicial reform. In its 1973 review of the British judicial process, the Diplock Commission produced two significant recommendations: that statements obtained in breach of common law rules should be admitted in evidence provided that they could be shown not to have been obtained by subjecting the accused to torture or to inhuman or degrading treatment, and that the police should have powers to detain suspects for questioning for up to three days.⁶³ Although internment was operative, legal statutes would provide another formal avenue to detain suspects. These recommendations, the most important of which was the abolition of juries, were quickly incorporated into the British judicial system.

The British courts turned to the Italians' judicial experience of prosecuting perpetrators of political violence as a model. The Italians successfully utilized the supergrass strategy as a means to combat the Red Brigades, Italy's equivalent to the IRA.

The basic concept of the supergrass strategy is simple. After detaining an individual suspected of a criminal or terrorist act, he is then interrogated at length in an attempt to obtain a confession. Should a confession be obtained, an offer of a reduced sentence or immunity is made in an exchange

⁶³Hillyard and Percy- Smith, 339.

for information which leads to an arrest of his accomplices or provides information against a violent organization to which he belongs.

Having observed the Italian's successful use of informants against the Red Brigades, the British eagerly implemented the technique in Northern Ireland. Although the recruitment of supergrasses in Northern Ireland was not difficult, the courts only accepted the evidence of four supergrasses during the period from 1973-1981.⁶⁴ Many of those arrested willingly accepted the promise of money, immunity and a new life in lieu of a lengthy prison sentence.⁶⁵ However, despite the successful recruitment of supergrasses, problems subsequently arose in two areas, maintaining the informants and effectively utilizing their testimony in the courtroom.

Once a supergrass was made, he and his family became the pawns of both the police and of the paramilitaries he was enlisted to testify against. The families were especially vulnerable. On the one hand, the police needed the family to support and maintain the supergrass in his commitment to be

⁶⁴A single supergrass was often used in a number of different cases. Additionally, it has been alleged that the police provided crucial information to the supergrasses in hard to solve cases which the police were eager to close.

⁶⁵Supergrass status gives prisoners extra privileges. They can have a cell of their own, sometimes at a police station instead of a prison. In the past supergrasses have been able to have color TVs in their cells, extended visits from friends and relatives, longer exercise and recreation periods. Vercher, 93.

the principle witness. On the other hand, the paramilitaries used the families as hostages in an effort to make the supergrass retract his testimony.⁶⁶

In the courtroom, the problems associated with the use of suspect testimony were worsened through the use of Diplock Courts. In these courts, which represent the only legal system for terrorists, trial is by judge rather than jury. Additionally, should the terrorist be found guilty, the system itself makes the possibility of appeal minimal.

Three areas of concern in regards to supergrass evidence were credibility, corroboration and the potential negative perceptions that a jury may have of a questionable supergrass. The judges wielded enormous authority in those cases which they tried. It was the responsibility of the judge to determine whether the supergrass was a credible witness. If he so deemed it, then the testimony would not have to be corroborated. And in the case of potential misperceptions, the judge needed to only warn himself, since there are no sitting juries. It was not surprising that many, both Catholics and Protestants, were wary of the judicial system in Northern Ireland.

Between January 1982 and January 1986 twenty-seven potential supergrasses had been proposed in Northern Ireland.

⁶⁶Hillyard and Percy-Smith, 351.

Seventeen of those retracted their testimonies prior to attendance and giving evidence at trial; two cases resulted in acquittals; eight cases resulted in convictions.⁶⁷ However, during that period of time it became evident that the supergrass system was not only ineffective in curtailing violence in Northern Ireland, but it was also producing a judicial system that was relying too heavily on the uncorroborated testimonies of criminals. A number of trials where such evidence was allowed created a groundswell of concern which eventually brought the system to an end. One lawyer summed up the concerns following a conviction of an accused where the majority of evidence against him came from a questionable informant:

Lawyers involved in the...case were shattered by the decision....One said to me that until then he had been prepared to trust judges to distinguish between good evidence and bad, but he now felt that the use of supergrasses could not be defended. These lawyers also felt that the chances of convictions being quashed on appeal were now slimmer, given the authority of the Lord Chief Justice [the presiding judge in this case] as head of the Bench of only eight High Court and Appeal Court judges.⁶⁸

The trial's outcome brought about skepticism about the supergrass system. Judges, realizing the "mistake", began to

⁶⁷Vercher, 94.

⁶⁸Ibid., 104.

overtake a number of previous convictions in which the testimony of supergrasses was used.

A definitive analysis cannot be made as to the overall effectiveness of the supergrass strategy.⁶⁹ However, the way it was administered helped to bring about its demise. In 1986 as an outcome of the Anglo-Irish Agreement of 1985, the system was officially stopped in an effort to assure to both the republicans and loyalists that the administration of law in Northern Ireland was being applied impartially.⁷⁰

As was the case with internment, the supergrass system produced some negative side effects. Police cooperation from citizens declined, thus creating an impediment to the apprehension of terrorists. There was a utility in the use of supergrasses; however, as the British continue to struggle in their efforts to classify political violence as a special type of criminal act, they are ultimately finding that law cannot

⁶⁹A 1983 Chief Constable report stated that, "In one area of Belfast alone which suffered from a high level of terrorist crimes, there was a reduction of 73% in the murder rate and an overall reduction of 61% in terrorist activity." Yet, an examination of the sentencing patterns of criminals during that time frame would indicate that there was no marked increase in the number of serious crimes being prosecuted. Additionally, a review of the strategy resulted in a finding that, "...the insignificant impact of the supergrass system on the level of violence has driven the final nails into the coffin [of the system]." Hillyard and Percy-Smith, 352.

⁷⁰The Agreement had as its aims, the promoting of peace and stability in Northern Ireland; helping to reconcile the two major traditions in Ireland; creating a new climate of friendship and co-operation between the people of the two countries' [Ireland and Britain], and also improving co-operation in combating terrorism. Vercher, Terrorism in Europe, 402.

be used solely to solve political problems.

C. ESCALATION OF FORCE

Since 1921 the IRA has engaged in a relentless, at times, erratic campaign to reunite the two Irelands. Both the Stormont government in Northern Ireland and the Westminster government in London have dealt with political and violent repercussions of the IRA's efforts.

For nearly forty-eight years, both governments were content to utilize the police force of Ulster to respond to the terrorist threats and actions of the IRA. Yet, both governments, over a span of six years, proceeded to utilize a rapid escalation response to the IRA progressing from the use of the police to the British army's most elite unit.

In early 1969, the province of Northern Ireland was in the throws of a civil rights movement. The Northern Ireland Civil Rights Association was an organization intent on changing the social conditions which existed for the Catholic minority in Northern Ireland. The leaders of the civil rights movement first pursued their goals through peaceful political and legal action, hoping that public pressure would force Stormont and Westminster to undertake political, economic, and social reforms.⁷¹ However, when their peaceful political means

⁷¹John E. Finn, Constitutions in Crisis: Political Violence and the Rule of Law (New York: Oxford University Press), 58.

failed to achieve the desired results, a strategy shift to violent protest was employed.

The IRA was quick to recognize the opportunities that existed within the civil rights movement in furthering their violent methods of achieving the reunification of Ireland. By late 1969 it had become clear that the violent turn of the civil rights movement was being organized by the radical IRA wing:

It would be absurd to say that the present situation has been brought about solely by the machinations of the Movement. What has happened in fact is that the IRA/Republican Movement has been infiltrating and manipulating the Civil Rights Organization with great energy. The speed of success of the latter in producing the present condition in the streets has caught the IRA largely unprepared in the military sense....⁷²

The speed at which the IRA was able to influence the movement caught everyone by surprise and indeed may have inadvertently led to the sudden increase in violence that precipitated the retaliatory response of the Stormont and Westminster governments.

The Royal Ulster Constabulary had traditionally responded to Northern Ireland's recurring terrorist actions ranging from shootings and bombings to kidnaping; yet, it was the explosive outbreak of violence associated with the civil rights marches

⁷²Desmond Hamill, Pig in the Middle: The Army in Northern Ireland 1969-1984 (Great Britain: The Chaucer Press, 1985), 20.

that stretched them beyond their capabilities.

In late October, 1968, local Catholics in the city of Derry held a march in defiance of an order not to do so. The RUC's brutal attack against the peaceful, albeit illegal march resulted in injuries to seventy-seven civilians and eleven policemen.⁷³ The following January, the RUC refused to come to the aid of Catholic civil rights marchers being attacked by Loyalists. No one was killed, but several of the marchers were injured. In August of 1969, another parade erupted in the worst violence Northern Ireland had suffered since the early 1920s. During the violent encounter of the Loyalists and Catholics, the RUC "charged with batons, only to be attacked in return by Catholics armed with rocks and petrol bombs."⁷⁴ The Chief inspector of the RUC described the rioting in Belfast, in which five Catholics and two Protestants were killed (including a nine-year-old boy), as equivalent to a "a state of war."⁷⁵

1. Royal Ulster Constabulary

Traditionally, the police have been responsible for the internal security of Northern Ireland. The Royal Ulster Constabulary is the primary police force in Northern Ireland.

⁷³Ibid.

⁷⁴Ibid., 63.

⁷⁵Ibid.

The force came into being in 1922 and fell under the control of the Inspector-General, who was responsible to the Stormont Minister of Home Affairs.⁷⁶

It was stipulated that the size of the force should be about 3,000 men, a third of which was supposed to be of the Roman Catholic faith. Although prejudicial attitudes had kept the actual number of Catholics on the force at an insignificant level, the total number of men on the force remained fairly constant until 1969 when the troubles in Ireland necessitated the need for a larger force. In 1969 there were 3,044 members of the RUC, and by 1990 the number had increased nearly threefold to 8,250.⁷⁷

Members of the RUC were full-time employees, but they were augmented by a part-time force known as the B Specials. The B Specials had served as a support unit since the inception of the RUC, but their numbers were dictated on an "as needed" basis. During the Second World War their numbers began to grow as the need for a paramilitary "Home-Guard" force came about.

It is important to note that B Specials had regular jobs and usually worked with the RUC on either a part-time or on an "as needed basis". The lack of on-duty time in a police

⁷⁶G Davidson Smith, Combating Terrorism(London: Routledge, 1990), 198.

⁷⁷*Ibid.*

capacity was reflected in their training. Whereas the B Specials were trained in paramilitary type tactics, they lacked the necessary skills to handle the day-to-day civil duties. Consequently, the B Special's:

requirement to perform ordinary police duty was rarely placed upon him; and, his training and equipment, including the types of firearms with which he was issued, were primarily of a military nature and not designed for the ordinary police role.⁷⁸

Despite the lack of specific police training, the B Specials often worked side-by-side or independently of the RUC. For nearly forty-eight years those combinations of forces were able to keep the relative peace in Ulster. However, the Troubles that came out of the civil rights demonstrations brought peace to an end and brought in the army.

2. British Army

British troops had been present in Northern Ireland prior to the Troubles, but not for the purpose of internal-security duties. Since 1921 British soldiers had been stationed in Northern Ireland in the same manner as they had been in Great Britain. There existed a traditional connection between the British army and the region. A number of regiments were created in Northern Ireland and the army often recruited from the local population. Although the troops lived and trained in

⁷⁸Ibid.

Ulster, for security reason none of them served duty in Northern Ireland.

All that changed with the commencement of the Troubles. As earlier discussed, the Troubles represented a level of violence that hadn't existed in Northern Ireland since partition. The resultant violence left Westminster with no choice but to further involve itself in the internal matters of Ulster, despite their long held policy of noninterference.

There was continual fear among the Catholics in the region for their safety from the Protestants and the RUCs and B Specials who were assigned to protect them. Their fears were partly justified as evidenced by the number of killed and injured civil rights marchers mentioned earlier.

The response of the RUC's and B Special's (both of whom were nearly exclusively comprised of Protestants) to the violence was not one of impartiality, but rather one of retaliation against the Catholics, firing rubber bullets at will into the gathered crowds.⁷⁹ On the eve of August 14 1969, the Stormont Prime Minister, fearing that the violent situation had grown out of control, requested that British troops march into Derry to restore order. In return for the troops, the Prime Minister agreed to place the paramilitary

⁷⁹Finn, 64.

B Specials under the control of the British army.⁸⁰ However, once the army arrived they disbanded the B Specials in October, preferring instead to work with the Ulster Defence Regiment, a more professional reserve force.

Westminster agreed with the request and gave permission to the army to assist the RUCs; thus began the official involvement of the British army in the internal affairs of Northern Ireland. The initial mandate of the army was clear: separate and protect both sides of the internal conflict. However, soon after a modicum of peace was restored and yet the troops remained, it was clear that their role had changed:

Before the August rioting, the role of the British troops in Northern Ireland has been solely to support the RUC and B Specials in emergencies. After the Derry riots, the role of the army changed significantly. Instead of a force of last resort, the army became a security agency whose primary purpose was to maintain public order and to collect intelligence concerning the IRA. The change of purpose was reflected in the level of staffing. There were fewer than 3,000 soldiers in Ulster before the rioting. Four years later, 16,500 troops were in the province.⁸¹

The violence of Northern Ireland brought the army to the region; the inability of Stormont to govern itself and Britain's desire to eliminate the IRA kept them there.

The presence of the army in large numbers signified a

⁸⁰Ibid.

⁸¹Ibid., 65.

clear escalation in the response Westminster was willing to employ against the IRA. The IRA was also prepared to increase their level of violence in response.

From 1970, the British army waged a campaign to stop the violence, and the Catholic minority initially viewed the army as saviors. The citizens expected and received a relative state of peace. However, as the army carried out a series of new and unpopular government initiatives, consisting of internment, supergrasses and exclusion orders, the Catholics, as well as some Protestants, began to see them as oppressors. The IRA was able to capitalize on this perception by appealing to the sympathies of the Catholics.

The British army proved very capable in their efforts to separate the Catholics and Protestants. Having set up no-go areas in the Catholic ghettos, they initially served as "border guards" among the various cities.

Although the army was effective in keeping the two sides apart, they could do nothing to bridge the political gap between the IRA and Westminster. The IRA continued their covert terrorist actions, no longer under the guise of the civil rights movement but with the fervor of their true goal of reunification.

By 1972, the IRA had succeeded in disrupting Stormont's ability to govern effectively. Westminster lost patience with

the Ulster government and in March they took control of the region, instituting Direct Rule in Northern Ireland.

Ultimately, it was the IRA's violence, not the civil rights pressures which had been building up in the Catholic community, that brought an end to a government that had existed since the partition. For decades Westminster had been completely insensitive to the problems of the Catholics in Northern Ireland; it became sensitive only because of violence. In abolishing the Stormont Parliament, a declared objective of the IRA, Westminster was not in any sense surrendering its sovereignty over Northern Ireland but it was seen to yield politically to the bomb and the bullet.⁸²

Westminster attempted a more aggressive approach to governing, enacting several legislative and judicial reforms, already described, designed to bring the IRA to its knees. The army was tasked to carry out many of those reforms. The new policies were controversial with many people feeling they intruded too much on civil liberties. It was not surprising then to see that the army began to suffer some backlash from their presence. One army commander knew that their welcome would not last long stating, "The honeymoon period between

⁸²Stephen Haseler, The Death of British Democracy: A Study of Britain's Political Present and Future (New York: Prometheus Books, 1976), 105.

troops and local people is likely to be short lived."⁸³ He realized that his men might become the targets for mob hatred and violence from sides if the political problems were not solved quickly. His forecast turned out to be accurate.

The British government had failed to eradicate the IRA with legislation alone and despite the efforts of the army, the IRA remained intact. One of the army's problems was its inability to adjust to the IRA's use of guerrilla tactics; additionally, the IRA's ability to blend into the civilian community made them a difficult enemy to combat.

3. Military Elite: The Special Air Service

However, there was one segment of the army that had significant experience in unconventional warfare, the Special Air Service Regiment. The public use of the SAS in Northern Ireland had been resisted for a number of years due to the political signal Westminster felt it would send. Westminster had already experienced troubles explaining the continued use of regular army troops in the police assistance role; they were not prepared to have to explain the presence of their most elite war-fighting regiment which had previously been employed to fight only against guerrillas in British colonies or protectorates. All that changed, however, in 1976 when, in the Northern Ireland county of South Armagh, the fighting

⁸³Hamill, 21.

techniques of the IRA overwhelmed the capabilities of the regular army.

Armagh is located on the border of Ulster and the Irish Republic, making it an ideal location for IRA activities. The IRA was able to use the area as a way station for smuggling arms into the country, as well as exploiting the resources of a number of sympathetic Catholics.

The army had stationed a number of troops in the area but the IRA had a strategic advantage in the region. With Armagh's location along the border of Northern Ireland and the Irish Republic, the IRA readily crossed the border to elude pursuers from either region. The IRA exacted a significant death toll on the British army. During the same period of time in the conflict between the two sides, forty-nine British army troops had died in comparison to zero casualties for the IRA.⁸⁴

The flash point for Westminster occurred as a result of a particular bloody period in Armagh. During the six months prior to the SAS's public commitment to Ulster, 21 civilians were murdered in the border area as part of a tit-for-tat war of sectarian killings.⁸⁵ Among those killings was an IRA retaliatory strike that resulted in the death of ten

⁸⁴Tony Geraghty, Inside the S.A.S: The Story of the Amazing Elite British Commando Force (New York: Balentine Books, 1980), 173.

⁸⁵*Ibid.*

Protestants. Westminster could no longer ignore the civilian cries for help in the region and the regular army troops could not effectively combat the IRA guerilla style of fighting. Consequently, in January 1976, Prime Minister Harold Wilson, publicly announced from the House of Commons, that a squadron of eighty SAS men would be sent to Northern Ireland to track down the leaders of the IRA in South Armagh. With this first use of the SAS, Westminster was making a public statement that the IRA had become an intolerable threat to both Great Britain and Northern Ireland, and that threat deserved the response of Britain's military elite.

Training for members of the SAS is among the most thorough, strenuous and arduous that military personnel can participate in. All members of the SAS are volunteer soldiers chosen from regular army companies. Specialized training in weapons, intelligence gathering, foreign language skills, hand-to-hand combat, interrogation techniques, and insertion and extraction techniques were all part of the specific education and training that each SAS soldier possessed that the regular army personnel did not. The SAS perfected their unconventional warfare style of fighting in a number of hot spots: Malaya 1950-59; Oman 1958-59; Borneo 1962-66; Aden and its hinterland, the Radfan 1964-67; Yemen 1963-67; Oman again

1970-76.⁸⁶ It was these hard fought battles which earned the SAS the reputation of being the premiere fighting force in Britain's combat arsenal--one that in 1976 was directed against the IRA.

Although the IRA had increased the tempo of their terrorist campaign, it was, in fact, the actions of the Protestants which brought the SAS to the shores of Northern Ireland. The first traceable insertion of the SAS into an anti-terrorist role inside the United Kingdom came in September 1969, when a group of SAS men was dispatched to Northern Ireland to track down the routes by which, it was persistently rumored, the Protestants were smuggling arms into the province.⁸⁷ Britain's Westminster government, sensitive to perceptions that the Northern Ireland situation had grown so out of control that it would warrant a response of Britain's most elite military force, sent the SAS in under the guise of a "deniable" operation. That is, the SAS would have no official sanction to be in the region. Additionally, in further efforts to conceal the SAS's participation, SAS members were sent back to their regular army units; they were no longer SAS members but were instead highly skilled regular

⁸⁶Sunday Times (London) Siege: Princess Gate, London April 30- May 5 (London: Hamlyn, 1980), 103.

⁸⁷Observer (London), Siege: Six Days at the Iranian Embassy (London: MacMillan Books, 1980), 107.

soldiers. It could now be said that small groups and individuals of the SAS had been using their intelligence gathering expertise in the Ulster region for a number of years.

Fortunately for Westminster, the SAS successfully completed their mission in relatively short time and without incident. Buoyed by their successful deployment of the Regiment the first time, Westminster again sent the SAS back to the region in 1974, still in a "deniability" status in order to mount covert surveillance of suspected IRA leaders.⁸⁸

Westminster had succeeded in its goal of retaking control of South Armagh. Although the public orders for the SAS had been to bring peace to the area, what wasn't said publicly was the SAS's explicit orders: Do what the regular army could not... kill terrorists. It was a stunningly efficient performance, after five months, the top ten local IRA men were either dead, in custody, or hiding over the border⁸⁹. Despite Westminster's earlier concerns about public perception, reality proved much kinder to the government:

In any event, Whitehall was far from unhappy at the stir the SAS was causing over the water. Every thunderous condemnation of their achievements merely added to the unit's reputation, which in turn deterred the youth of the province from

⁸⁸Observer, 107.

⁸⁹Sunday Times (London), 103.

joining the IRA.⁹⁰

The short-term tactical gain was impressive. The SAS was successful in their initial control of the IRA activities. Their extensive use of intelligence was key in identifying a number of IRA operatives, and curtailing the arms smuggling that were occurring between the two Irelands. The SAS also sported a low casualty rate. From 1976 to 1980 the SAS lost only one man; in contrast, the regular army and Ulster Defense Regiment lost eighty-two men in the same period.⁹¹

The result of SAS participation in Northern Ireland was twofold. On the one hand, they excelled in intelligence gathering techniques. Maintaining a database of information on the IRA was essential in curtailing their activities. The number of terrorist acts did decline after the SAS's arrival. On the other hand, the recurring theme of political primacy came to light, in that, despite the SAS's excellent tactical performance against the IRA, they could not bring an end to the political war that existed between the IRA and the British government.

D. ANALYSIS

The previous discussion on the British decision to escalate the use of force points to an important concept.

⁹⁰Ibid., 109.

⁹¹Tim Pat Coogan, The IRA (London: Fontana Paperbacks, 1982), 478.

Political primacy, that is, dealing with the root political causes of the British-IRA conflict, is the key to solving the terrorist threat posed by the IRA. The legislative and judicial reforms that were enacted were ultimately unsuccessful in eliminating the IRA. In the case of the use of force, escalating from the police to the elite SAS only served to provide tactical wins, but failed to have a significant impact on the political objective of eliminating the IRA. This crucial point was acknowledged in the research of Tony Geraghty:

The campaign of terrorism and guerilla warfare in Northern Ireland seems certain to continue until the men of violence are isolated from their host communities. But -unlike the Third World- Ireland is not a place where that isolation can be achieved by building protective villages for non-combatants while converting large parts of the country elsewhere into "free-fire"zones...in this case, isolation of terrorists has to be achieved politically, in men's minds, as well as militarily.⁹²

The cases show that, as a tool of the government, the military cannot function as political ambassadors. They can only serve as military ambassadors in support of political aims. In the case of terrorism, the army, specifically the SAS, proved effective in achieving the government's military objectives against the IRA, but without the government's

⁹²Geraghty, 185.

ability to concurrently achieve the political objectives of stopping the IRA, the war continues.

IV. CONCLUSION

According to the FBI, there have been 13 domestic terrorist incidents in the United States since 1993. Eleven of those occurred on a single night when animal rights activists placed small incendiary devices in four Chicago department stores that sold furs. The death toll of those eleven incidents, plus one other was zero. However, on February 26, 1993 a bomb ripped through the World Trade Center killing six persons. Two years later, on April 19, 1995 a massive explosion destroyed the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 men, women and children. Those two explosions signaled to the general public that the United States is vulnerable to domestic terrorist attacks. The spotlight on the bombings also reignited the discussion on the means the U.S. possesses to protect its citizens.

This thesis presented two parallel stories of how nations have dealt with domestic violence and the use of the military. The stories, one of legislation in the United States that curtailed the domestic use of the military and one of legislation in the United Kingdom that increased the use of the military both provide hints as to the concerns the U.S. might address in response to a potentially changing security environment involving the increased death toll of Americans

from terrorist incidents.

The impetus for the British legislation was the activities of the IRA in Northern Ireland. In that case the violence grew to a point where normal legislative and security policies were no longer effective to counter the terrorist threat. As a result, stronger, more restrictive measures were enacted through the use of the Prevention of Terrorism (Temporary Provisions) Acts and the domestic use of the military.

The British responded by enacting several legislative statutes which limited the rights of the accused while enhancing the ability of law enforcement agencies and the legal system to apprehend and prosecute suspected terrorists. In the wake of the latest American bombings, the United States has responded by attempting to enact several laws which would accomplish the same goals.

On February 10, 1995, a counterterrorism bill drafted by the Clinton Administration was introduced in the Senate and the House of Representatives. The Omnibus Counterterrorism Bill attempted to introduce far-reaching measures to strengthen the federal government's ability to combat domestic and international terrorism. The bill would give the government greater leeway in its ability to classify certain specific acts of violence as terrorist rather than criminal in

nature. The classification is important in that, under the proposed bill, terrorist acts would fall under the jurisdiction of federal authorities, unlike other criminal acts, presumably making it easier to prevent and punish acts of terrorism.

However, concerns have been raised as to the constitutionality of several of the proposals and their encroachment on the civil liberties of citizens of the United States. Of specific concern are the provisions which would:

- 1) authorize the Justice Department (meaning the FBI) to pick and choose crimes to investigate and prosecute based on political beliefs and associations;
- 2) expand a pre-trial detention scheme that puts the burden of proof on the accused;
- 3) loosen the carefully-crafted rules governing federal wiretaps, in potential violation of the Fourth Amendment;
- 4) establish special courts that would use secret evidence to order the deportation of persons convicted of no crimes, in violation of basic principle of due process;
- 5) permit permanent detention without judicial review by the Attorney General of aliens convicted of crimes;
- 6) give the President unreviewable power to criminalize fund-raising for lawful activities associated with unpopular causes; and

7) renege on the Administration's approval in the last Congress of a provision to insure that the FBI would not investigate individuals or organizations based on First Amendment activities.⁹³

These provisions generated much discussion over the potential danger they represent to the civil liberties of Americans. In a speech given in Washington, D.C. in April 1995, Roy Orbison, President of the National Strategic Information Center and Associate Professor at Georgetown University made clear his concerns on the bill, which he believes to be too intrusive. He stated that, "while we need to defend ourselves against terrorism, we must simultaneously defend our civil liberties. The law, and law enforcement, must not impede constitutional freedoms."

Concerns also were raised that the legislation was an overreaction to the recent terrorist incidents which have occurred within the past three years. One commentary stated that:

Terrorism, like war, always gives government an opportunity to grow. The threat to law and order seems to call for an adjustment in the balance between liberty and public safety. The World Trade Center and Oklahoma City terrorist bombings are no exceptions. The dust had hardly settled in Oklahoma before the President and some in Congress began the headlong rush toward increasing federal

⁹³Karla P. Fears, Thesis: The FBI and Domestic Counterterrorism: A Comparative Analysis (Monterey CA: Naval Postgraduate School, 1995), 53-54.

jurisdiction over various crimes. The vehicle for this expansion is President Clinton's "Omnibus Counterterrorism Act of 1995."⁹⁴

However, given the fact that the legislation was proposed prior to the bombings, one may assume that there already existed a growing concern over the increase in terrorism. Yet that concern apparently wasn't strong enough to get the proposed bill out of committee. Instead another version surfaced.

In April 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), sponsored by Republican Senator, Robert Dole of Kansas. The Act originated from the omnibus bill, but removed virtually all the provisions that would have widened and strengthened the authority of the FBI and the Attorney General in deterring, monitoring and prosecuting terrorists. AEDPA instead provides watered-down provisions that ban financial support to nations or foreign organizations considered to be terrorist, and a requirement that terrorists make restitution to their victims.

President Clinton had certainly wanted a stronger law. Prior to the bill's passage Clinton made clear his concern that the bill being sponsored by Dole was weak in comparison to his own, stating that, "If we're going to have a bill, we

⁹⁴David W. Neuendorf, Terrorism Bill Should Be Stopped (Internet, <http://dalin.ind.net/~dneuendo/index.html>, 1995).

need a real bill. It needs to be a bill that will help us to combat terrorism at home and abroad. So I hope that when this bill gets into conference it will be made much stronger."⁹⁵

Clinton wasn't the only one disappointed with the Act. The ranking Democrat on the House Judiciary Committee, John Conyers, Jr. of Michigan stated that, "what we have here is a low-grade crime bill, filled with the cats and dogs that have been laying around here for years," and adding, "This is a baloney sandwich with no meat on it."⁹⁶

Although the President and some members of Congress were disappointed with the content of the bill, the public apparently was satisfied, as the bill passed both houses and became law. While Americans may be concerned with the increase in domestic terrorism, they have not reached the point where they are ready to give up a significant measure of their civil liberties.

Among the provisions that were not included in the Dole amendment, but still reside in Clinton's languishing bill, is the clause which would allow for the employment of the military in domestic law enforcement. As a result, it would appear that the Posse Comitatus Act again had come under

⁹⁵Stephen Labaton, "After Trims, House Passes Counterterrorism Measure," New York Times, 15 March 1996.

⁹⁶Ibid.

attack by an administration which feels that the statute prevents the President from utilizing all the resources at his disposal in a forthright and legal manner.

Despite the administration's desire to repeal the statute, strong opposition continues. According to the National Center for National Security Studies, the section in the Clinton bill requesting the expanded use of the military would provide a wholesale exemption from one of the oldest protections in American law, the separation between military and police.⁹⁷ The section provides that in the course of an investigation or apprehension the Attorney General may request assistance "from any Federal, State, or local agency, including the Army, Navy and Air Force, any statute, rule or regulation to the contrary notwithstanding."

It appears, for now, that neither scholars nor politicians are ready to end the 120 year old statute. Roy Godson's comments on the subjects included his warning on the steps the U.S. may be taking to disrupt terrorism, stating that, "We academics, policy makers, and certainly in a democracy such as ours, the public--need to understand what disruption is, and what it is not...It does not include granting special police powers to the military or other non-

⁹⁷Center For National Security Studies, Clinton Terrorism Legislation Threatens Constitutional Rights (Washington D.C.: Gelman Library, 1995), 5.

law enforcement entities."

Although we can utilize the British model of legislative reforms as a comparative tool to hypothesize the direction future U.S. legislation may take, in the near-term Americans seem satisfied with the current cautious approach. In regards to the domestic use of the military, the United States may learn valuable information by examining the British army's own assessment of their role in domestic affairs. Desmond Hamill, in his study of the army's presence in Northern Ireland between 1969 and 1984 concluded that military presence in Britain should only exist under very specific conditions.

In 1969, when the Army moved onto the streets of Northern Ireland, the common military and political view was that the crisis would be resolved by the deterrence of the threat of force; by the use of force, particularly lethal force; and by the reassurance which the presence of the Army would give.⁹⁸ That did not turn out to the case. Members of the army found themselves involved in situations for which they were unprepared. Trained as efficient fighting men who were prepared to kill the enemy if necessary, they found themselves dealing with the unfamiliarity of facing their own citizens and different rules of engagement. The results were one of uncertainty and confusion as to their role in quelling

⁹⁸Hamill, 279.

domestic disturbances. One observer of the army's role said:

I don't think many people who were not soldiers in Ulster in the early days realize the nightmare pressure and the difficulties. It wasn't just a fear of death or injury, although that had an effect. It was the feeling of uncertainty, frustration and helplessness; of not understanding what was involved, or what ought to be done, or what was going to happen next. Among well trained, disciplined and moral troops this leads to involvement in activity for its own sake, which gives the illusion of achievement, while the situation slowly slips away. It leads to demands for will-o'-the-wisp solutions- like internment, cross-border cooperation, hot pursuit across the border, direct liaison with the Irish Army. But none of these would make any decisive difference. That's with good troops! With bad ones the results are terrifying.⁹⁹

Senior army officers concluded that their role in domestic affairs should be severely restrained, and that the primary role of maintaining domestic order should fall on the police. The military leaders also recommended that, should the army be called in, there should be no question as to the chain of command, adding that either the police or the military should be totally subordinate to the other.

In regards to the military elite, namely the SAS, the recommendation was that their use be ruled out in all domestic disturbances. Despite their success in Northern Ireland, it was found that highly trained, motivated and elite assault units can sometimes cause as many problems as they solve

⁹⁹Ibid., 280.

unless commanded by exceptional leaders of intelligence and moral stature.¹⁰⁰

Although the British military clearly wishes to stay clear of domestic affairs, they would feel more comfortable about entering a situation if specific guidelines were maintained as to their use. Specifically, three fundamental questions would have to be asked: First, what is the threat? Second, what has failed within the civil administration? Third, how is the local population involved or affected?¹⁰¹ "Only when these questions are fully answered," said one officer, "can the role of the army, and the intricate business of relations with the police, be decided. Until then, any discussion on all this is rather like the Zen Bhuddist process of 'meditating about the sound of one hand clapping.'"¹⁰²

Within the United States armed forces, the same concerns should be shared. If someday the domestic use of the military should become necessary, we should expect from the British experience that their use should be severely restricted. Considerations should be made as to the scope of the mission, the exhaustion of all civil remedies, the timetable for military involvement, the training of forces in civil

¹⁰⁰Ibid.

¹⁰¹Ibid., 281.

¹⁰²Ibid.

disorders, and the establishment of a clear chain of command.

Finally, the United States must ask itself if it would be opening Pandora's box by eliminating or reducing the restrictions imposed by the Posse Comitatus Act. Should those restrictions be lifted, the extent to which the military could be used domestically could expand beyond those currently envisioned by those who seek its repeal.

It was shown in the British example that domestic military use in Northern Ireland, while at first designed to simply quell the violence brought on by the Troubles, turned into a mission those military forces were not expecting or equipped to handle properly. Perhaps the same situation could happen here in the United States. Had the military been used in the two and a half month standoff with the Freemen in Montana, for example, would both the American public and the military have seen it as a military occupation?

The future domestic security environment of the United States may dictate the limited need for domestic use of the military to combat domestic terrorism. Present and future administrations should be mindful of the potential dangers that may present themselves through the erosion of the constitutional protection afforded in such legislation as the Posse Comitatus Act. The United States' legislative history coupled with the British experience with the IRA in Northern

Ireland, provides a road map to follow in initially examining possible future courses of action in response to potential domestic terrorist threats.

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